TESTIMONY FOR THE HOUSE ADMINISTRATION COMMITTEE SUBCOMMITTEE ON ELECTIONS

Hearing on Voter Registration and List Maintenance (cont.)

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My name is Joe Rich. Since May, 2005 I have been Director of the Housing and Community Development Project at the Lawyers' Committee for Civil Rights Under Law. Previously I worked for the Department of Justice's Civil Rights Division for almost 37 years. The last six years – from 1999-2005 – I was Chief of the Division's Voting Section.

I have been asked to address the issue of "vote caging" and first want to thank the Committee very much for the opportunity to state my views on this subject. Vote caging is the term given an unfortunate practice that undermines the integrity of our electoral system. Targeted at traditionally disenfranchised voters, this practice relies on voter "challenge" laws to blindly question the ability of eligible voters to cast a ballot. While dressed in the garb of protecting against the "voter fraud," caging is really a cynical way to undermine the most fundamental right of all Americans – the right to participate freely

in our democracy – for partisan gain. It is especially pernicious because it has almost invariably been used to suppress the vote of minority voters.

My testimony will first provide some background on vote caging and then focus on what I believe has been increased use of the technique in recent years with special attention to the significant impact of this deplorable practice, and how the Department of Justice addressed the issue when I was Chief of the Voting Section. I conclude with suggestions to address the practice.

I. BACKGROUND

Vote caging is another name for a "ballot security" technique that has been used for many years. An especially good summary of such techniques can be found in the September, 2004 report entitled "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both? A Report to the Center for Voting Rights and Protection," authored by Chandler Davidson, Tanya Dunlop, Gale Kenny and Benjamin Wise. (hereinafter referred to as "Ballot Security Report") The report focuses on numerous vote suppression programs connected with what the authors call "*ballot security programs gone bad" or* "programs that, in the name of protecting against vote fraud, almost exclusively target heavily black, Latino or Indian voting precincts and have the intent and effect of discouraging or preventing voters in those precincts from casting a ballot." (Executive Summary) This report details the history of such voter suppression programs from the 1950's through 2004.

Several of the programs described in this report were brought to the attention of the Department of Justice and actions were taken to combat them. For instance, in the 1990 Senate race in North Carolina pitting the incumbent Republican, Jesse Helms,

against Harvey Gantt, an African-American who had been the first of his race to enter Clemson University and the first African-American mayor of Charlotte. In the last week of the campaign, the Helms campaign and the State Republican Party sent out 150,000 postcards to persons living in heavily minority areas in the state which contained threatening and false warnings. The Civil Rights Division got involved shortly before the election and secured an agreement from the Republican Party that information from the postcards would not be used to challenge voters. In addition, a team of Voting Section monitors were sent to North Carolina to observe the election. After the election, the Division filed a lawsuit alleging intimidation and interference with black voters in violation of the Voting Rights Act. The case was settled by consent decree which enjoined any future ballot security programs targeting minority voters and required approval of the federal court for any future ballot security programs of any kind. (See Ballot Security Report, pp. 72-75).

The Summary and Conclusions to the Ballot Security Report states:

> The foregoing examination of Republican ballot security programs since the 1950's can be summarized succinctly. However legitimate the party's desire to guard against Democratic election fraud, these programs have sometimes degenerated into efforts to suppress the votes of blacks and Latinos – often the poorest and most vulnerable among them. (Report, p. 96).

As the Report documents, such efforts were not isolated and were well-organized.

II. VOTE CAGING IN 2004

In summarizing the types of voter suppression programs used , the Ballot Security Report lists eight different types of programs, one of which is described as "Challenging voters using inaccurate, unofficial lists of registrants derived from 'do-not-forward' letters sent to low-income and minority neighborhoods." (Report, p. 97) It is this practice

that has come to be known as vote caging. Since the attention brought to this term by Monica Goodling in May, three reports concerning vote caging have been published. First, in June, 2007 the Brennan Center published two guides: "A Guide to Voter Caging" and "Reported Instances of Voter Caging."[1] Second, in September, 2007 Project Vote published "Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters," by Teresa James (hereinafter referred to as Project Vote Study).[2] Third, Davidson, Dunlap, Kenny and Wise have written a follow-up article to the 2004 Ballot Security Report focusing specifically on vote caging entitled "Vote Caging as A Republican Ballot Security Technique," forthcoming in the William Mitchell Law Review, vol. 34 (hereinafter referred to as Ballot Security Report II).

The articles provide similar definitions of "vote caging." For instance, the Project Vote Report states:

> Vote caging is a practice of sending non-forwardable direct mail to registered voters and using the returned mail to compile lists of voters, called 'caging lists,' for the purpose of challenging their eligibility to vote. In recent years, other techniques, such as database matching have been used to compile challenger lists. (p.3)

In the Ballot Security Report II, "vote caging" is defined as

> We define vote caging as typically involving a three-stage process designed to identify persons in another party or faction whose name is on a voter registration list but whose legal qualification to vote is dubious, and then to challenge their qualification either before or on Election Day. Ostensibly, caging is an attempt to prevent voter fraud. In practice, it may have the effect of disfranchising voters who are legitimately registered.
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> *In the first stage*, political operatives typically identify a geographic area with a disproportionate number of registered voters who belong to a different party from that of the operatives.

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[1] See www.brennancenter.org/stack_detail.asp?key=348&subkey=49604&proj_key=76 and www.brennancenter.org/stack_detail.asp?key=348&subkey=49605&proj_key=76.

[2] See http://projectvote.org/fileadmin/projectvote/publications/caging_democracy_report.pdf.

> *In the second stage*, the operatives send first-class, do-not-forward letters (sometimes by registered mail) to people in the identified areas, sometimes asking them to perform a simple task that includes responding by mail to the original letter. All letters returned to the senders unopened are assumed to indicate the addressees no longer live at the address that appears on the registration rolls and therefore may not be legally entitled to vote. Their names are then put on a "caging list."
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> *In the third stage*, political operatives allied with those who constructed the caging list may appear on Election Day at the polling places where those people whose letters were returned unopened may try to vote. The voters would then be challenged individually, either by the partisan operatives or by election officials who have been supplied with their names by the operatives, depending on the state's laws.

These activities have the effect of discouraging voters who are challenged as the challenge process is cumbersome and time-consuming. They also may cause delays and lines further lowering the number of persons who vote. Especially alarming as noted earlier, it is almost always targeted to areas with heavily black and Latino concentrations. Indeed, in 2004 one state representative in Michigan told a county Republican Party meeting that: "If we do not suppress the Detroit vote [over 80% African-American], we're going to have a tough time in this election." (Report, p. 96)

Ballot security measures of this kind have been used for many years. The Brennan Center and Project Vote Reports spell out several examples of vote caging schemes in recent years. The Project Vote study estimates that in 2004 over half a million voters in nine states were the targets of vote caging operations, and that at least 77,000 had their votes challenged between 2004 and 2006. (Project Vote Report, p.4) The Brennan Center has presented accounts of vote caging in five instances in 2004 in Ohio, Nevada, Pennsylvania, Florida, and Wisconsin.[3] In the Project Vote Report, actual or intended voter challenges in 2002 or later, which may have involved caging lists derived from other techniques than direct mail, are discussed as having occurred in

[3] Levitt and Allison, *Reported Instances of Vote Caging, op. cit*., 1-5.

Wisconsin (2002 and 2004), North Carolina (2004), South Carolina (2004), Georgia (2004), Kentucky (2004), Washington (2005), and New York (2006).

Several of these schemes came to the Voting Section's attention while I was at the Department of Justice through April, 2005. The most extensive were the voter caging activities in 2004 were in Ohio. According to the Project Vote Report, over 232,000 letters were sent to newly registered voters by the Republican Party and around 30,000 were returned as undeliverable. Lists of returned mail to election officials were used to supplement the list. In the end, a list of over 35,000 voters in the five metropolitan areas with the highest number of minority voters was used as a challenge list, accompanied by a major publicity campaign. See Project Vote Report, pp. 16-18. Extensive litigation challenged this vote caging program. *Id.*, pp.29-31.

Despite the scope of the Ohio vote caging operation, the Department of Justice's response was very limited. Moreover, the actions taken were indicative of the politicization of the Civil Rights Division of which I have testified in the past. The Voting Section monitored the reports of vote caging and the resulting litigation. Although there were individuals sent to Ohio to monitor the election as part of a major monitoring effort by the Division during the 2004 election, it was limited to six persons who were handpicked by the political appointee overseeing the Voting Section, Bradley Schlozman, overruling the Voting Section recommendations.[4] These persons did not report to career supervisors which was the standard procedure when monitoring elections.

In addition, in one of the cases growing out of this caging activity, *Spencer v. Blackwell*, (S.D. Ohio), the actions of Department indicated a partisan tinge. In this case

[4] Schlozman himself was on the ground in Miami monitoring the election in the second major battleground state – Florida.

brought shortly before the 2004 election, the Democratic Party sought to enjoin any challenges of voters in Hamilton County, Ohio, alleging that the vote caging program discriminated on the basis of race. On November 1, 2004, the District Court granted the requested relief. It found that in addition to the usual executive challengers who did not come to the polls, the Republican Party filed to have 251 challengers and that

> ". . . two-thirds of them filed to be challengers in predominantly African-American precincts. The evidence presented at the hearing reflects that 14% of new voters in a majority white location will face a challenger . . . but 97% of new voters in a majority black location will see such a challenger."

347 F. Supp. 2d 528, 530 (S.D. Oh. 2004). The court then went on to state

> The evidence before the Court shows that in Tuesday's election, the polling places will be crowded with a bewildering array of participants -- people attempting to vote, challengers (Republican, Democrat, and issue proponents or opponents), and precinct judges. In the absence of any statutory guidance whatsoever governing the procedures and limitations for challenging voters by challengers, and the questionable enforceability of the State's and County's policies regarding good faith challenges and ejection of disruptive challengers from the polls, there exists an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door.

347 F. Supp. 2d at 534.[5] In short, this was a classic and especially extensive vote caging scheme,

The United States was neither a party nor an *amicus curiae* in the case, but nonetheless took the unusual step of sending the Court a letter on October 29, 2004, a letter drafted and submitted to the Court by the political appointees in the Division with no knowledge, much less input, from the Voting Section career staff. Although the case raised serious claims of race discrimination, the letter from Alex Acosta, the Assistant Attorney General for the Civil Rights Division inexplicably did not address this issue.

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[5] On November 2, 2004 the Sixth Circuit Court of Appeals granted motions for emergency stays of the District court order,primarily on standing grounds, with no mention of the evidence of racial discrimination produced by plaintiffs. See 388 F. 3d 547 (6th Cir. 2004).

Rather, it discussed the requirement of the Help America Vote Act that required voters be permitted to vote a provisional ballot. It then went on to argue in favor of permitting the challenges: "We bring this provision to the Court's attention because HAVA's provisional ballot requirement is relevant to the balance between ballot access and ballot integrity. Challenge statutes such as those at issue in Ohio are part of this balance." The letter goes on to state that "nothing in the Voting Rights Act facially condemns challenge statutes" and further notes that a "challenge statute permitting objections based on United States citizenship, residency, precinct residency, and legal voting age like those at issue here are not subject to facial challenge (as opposed to as applied challenge) under the Act because these qualifications are not tied to race." Amazingly, the Civil Rights Division letter makes no mention of the strong evidence that the challenge/vote caging plan was targeted at predominantly African-American precincts. The District Court ruled for the plaintiffs on November 1, 2004 and made no mention of this letter in its opinion.

In another battleground state in 2004, Florida, vote caging was also quite sweeping. As described in the Project Vote Report at pp. 18-20, the counties with the largest minority populations, such as Dade, Broward and Duval, were targeted for challenge lists based on mailings to new registrants. Minority precincts were disproportionately targeted for the challenge lists. According to the Project Vote Report, in Dade County, 59 percent of the predominantly minority precincts were scheduled to have one Republican challenger, as opposed to 37% of the predominantly white precincts. Moreover, the information was sent to the national headquarters of the Republican National Committee. The Voting Section received reports of the vote caging/challenge plans in Duval County about ten days before the election. Its response

was more affirmative than in Ohio. An attorney was sent there to investigate and at the election the Department placed monitors in the county on election day. Apparently as a result of the publicity and the Department's attention to this matter, the Republican Party greatly reduced or eliminated its challenge plans on election day.

Other vote caging type incidents which came to the Voting Section's attention included the threatened challenge to voters at predominantly African-American precincts in Louisville, Kentucky by the Republican Party in 2003.[6] In response to this information, a Voting Section senior staff attorney investigated the allegations and monitored the election. Similarly, before the 2004 election, reports of vote caging-type activities in Alamance County, NC,[7] and Atkinson and Long Counties, Georgia[8] were investigated and monitors were present at the polls on election day. In each case, the ethnically targeted challenge plans were successfully addressed because the schemes had been made public and the Department of Justice, as well as many interested national groups and local people, took strong responsive action.[9]

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[6] See Project Vote Report, p. 24; Ballot Security Report, pp.

[7] See Project Vote Report, p. 23.

[8] See Project Vote Report, pp. 23-24. The Long County matter first surfaced the summer of 2004 at the primary. About a year and a half later, in February, 2006, the Civil Rights Division brought suit against Long County for permitting challenges against voters with Hispanic names at this primary. A consent decree settling this matter was entered immediately. It included the following language: "Defendants shall provide to each person who wishes to challenge the right to vote of any elector and to each person who wishes to challenge the qualifications of any elector on the list of registered voters a notice that states: 'A challenger must have a legitimate non-discriminatory basis to challenge a voter. Challenges filed on the basis of race, color, or membership in a language-minority group is not legitimate bases for attacking a voter's eligibility.'" Unlike the normal caging scheme, these challenge activities were the result of anti-immigrant sentiment not planned voter caging activity of the Republican Party. This was also true in Atkinson County, GA and Alamance County, NC.

[9] For example, in Atkinson County, Georgia, there were challenges of all Latino surnamed voters on the rolls. The Election Protection Coalition (which is led by the Lawyers' Committee) received the complaint and its lawyers on the ground sprang into action, working with the local election official to dismiss all of the challenges.

Finally, it is clear that challenge practices similar to vote caging remain a major threat to free and open elections. Just a few weeks ago, the registration eligibility of 909 students at Georgia Southern University was challenged by local residents in Statesboro, Georgia. The students had been organizing to elect a number of members of the city council that represented their interest. After an extremely successful voter registration drive demonstrated the potential power of this new voting bloc, long time residents got nervous and filled out the 909 voter challenge forms. Despite a requirement under Georgia law requiring personal knowledge in order to file a challenge, each of the forms used in this challenge were identical, save for the name of the challenged voter.

After a member of the community contacted the Lawyers' Committee to complain about the challenges, we began investigating and monitoring the situation closely as the students went to the polls during early voting and on Election Day. Unfortunately, this caging operation was partially successful, keeping student turnout relatively low. The race in one of the city council districts was left in limbo as there were more challenged ballots than the difference between the two candidates. Just two days ago, the challenges were dropped under the threat of litigation from the Lawyers' Committee, our local leaders in the Election Protection Coalition and the ACLU. .

III. RECOMMENDATIONS

It appears that in 2004 vote caging activities increased significantly, especially in battleground states. These activities are especially pernicious and are a threat to fair elections in the future. They are targeted primarily at minority voters, affecting **tens of thousands** of voters. They are potentially very disruptive to the voting process, causing delays in voting and long lines at polls. Even with the availability of provisional ballots,

the burden on voters to ensure that a provisional ballot forced to be used by vote caging activities is significant. Moreover, publicity about such activities is likely to deter thousands of other voters from even attempting to vote.

The stated reason for such activities is to fight what is painted to be widespread voter fraud. This issue has been debated for years and the argument that there is widespread voter fraud has been used over and over again in support ballot security programs. In recent years, it has been used as the chief justification for the passage of laws requiring the showing photo id cards to vote, despite, again, strong evidence that such a requirement disproportionately disenfranchises otherwise eligible minority voters. Yet, in the two states in which there has been litigation about voter id laws – Georgia and Indiana – there is no evidence that persons have been prosecuted for fraudulently voting twice in different names. Like voter id laws, permitting vote caging activities which can disenfranchise tens of thousands of eligible voters cannot be fairly justified to fight only anecdotal evidence of voter fraud.

In view of the growing use of vote caging schemes and the disenfranchising impact of these activities, I recommend Congress give serious consideration to new legislation to prohibit directly vote caging. Most vote caging activities may violate the Voting Rights Act, but it is recognized by experts in the field that there are shortcomings in the protections provided because of proof problems that arise in enforcement of the applicable sections of the Act. Direct prohibition of vote caging activities would be more effective in deterring vote caging and would bring needed clarity to deterring, and hopefully ending it.

First, there should be a prohibition of the use of direct mail to compile vote caging lists. The National Voter Registration Act (NVRA) contains registration list maintenance activities that require such mailings as part of requirements to maintain accurate registration lists and remove ineligible voters from these lists. Determining which voters are eligible and who should be purged is the responsibility of election officials and should be the exclusive province of these officials. Activities that are used by election officials to carry out this responsibility should be limited to election officials who are not performing such tasks for partisan purposes which infect vote caging activities by political parties.

Second, there should be a provision in an anti-caging bill law that challenges to voters can only be made on the basis of personal knowledge of the challenger. Reliance on evidence that is not personally known by the challenger and is not conclusive proof of ineligibility should not be permitted in the challenge process.